Supreme Court, U. S.
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No. 97-358

In The

Supreme Court of the United States

October Term, 1996

GEORGE K. PRICE and HARRY L. SCHUMAN,

Petitioners,

v.

FCC NATIONAL BANK,

Respondent.

On Petition For A Writ Of Certiorari To The Illinois Appellate Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LYNN A. GOLDSTEIN
JOHN C. SIMONS
(*Counsel of Record*)
The First National
Bank of Chicago
One First National Plaza
Chicago, Illinois 60670-0286
(312) 732-6919; 732-5099

Attorneys for Respondent
FCC National Bank.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED[1]

Whether this Court has jurisdiction, pursuant to 28 U.S.C. § 1257(a) (1994), to grant a petition for a writ of certiorari from a state court decision dismissing state law claims according to state law principles and, if so, did the Illinois Appellate Court misconstrue Illinois common law by holding that the way in which a credit card issuer disclosed its cardholders' payment due dates on their monthly billing statements did not constitute either a breach of contract or fraud under Illinois' common law.

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[1] Pursuant to Supreme Court Rule 29.6, Respondent, FCC National Bank ("FCC"), states that it is a wholly-owned subsidiary of First Chicago NBD Corporation.

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STATEMENT OF THE CASE

FCC issues First Card Visa and Mastercard credit cards. Pursuant to the Agreement between FCC and its cardholders (the "Agreement"), payments are due on or before the Payment Due Date shown on the billing statement sent to the cardholder monthly. If the bill is not paid in full on or before the Payment Due Date, according to the Agreement, finance charges are charged beginning on the date the purchases were made. If the bill is paid in full on or before the Payment Due Date, the Agreement provides that no finance charges are charged.

The Payment Due Date on each billing statement varies from 20 to 25 days from the billing date. The Payment Due Date for cardholders who have not paid their bills in full ("Partial Paying Cardholders") is 25 days from the billing date; the Payment Due Date for cardholders who have paid their bills in full ("Full Paying Cardholders") is 20 days from the billing date. For the Full Paying Cardholder, finance charges are assessed only if payment is not received within 25 days; in other words, there is a five-day shadow grace period for Full Paying Cardholders.

This shadow grace period is expressly permitted by Section 127(b)(9) of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1637(b)(9), which requires a creditor to provide its cardholders who have outstanding balances with monthly billing statements informing them of:

> The day by which or the period (if any) within which, payment must be made to avoid additional finance charges, except that the creditor may, at his election and without disclosure,

> impose no such additional finance charge if payment is received after such date or the termination of such period.

The shadow grace period protects Full Paying Cardholders, those who want to avoid finance charges, from their own inadvertence in mailing their payments a few days late or the vagaries of mail delivery. The practice also greatly reduces cardholder complaints and increases cardholder satisfaction, while simultaneously encouraging cardholders to make sure their payments are received timely. For Partial Paying Cardholders, the number of days used in calculating the Payment Due Date does not matter because interest is charged from the date of their purchases.[2]

In 1992, Petitioners brought suit, in federal court, claiming that FCC's shadow grace period violated TILA, as well as Illinois statutory and common law. The TILA claim was concluded when the United States Court of Appeals for the Seventh Circuit, affirming the district court, held that FCC's shadow grace period complied with TILA, and this Court declined to review that decision. *See Price v. FCC National Bank*, 4 F.3d 472 (7th Cir. 1993), *cert. denied*, 510 U.S. 1046 (1994).

Thereafter, Petitioners refiled their state law claims, which had been dismissed for want of jurisdiction after

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[2] Contrary to Petitioners' assertion, Petition For A Writ Of Certiorari ("Petition") at 10, FCC does in fact assess finance charges against certain cardholders who pay their balances in full within 25 days. Partial Paying Cardholders who then pay their balance in full are assessed finance charges until their accounts are paid in full.

the dismissal of their TILA claim, in an Illinois state court. There they claimed that FCC's shadow grace period policy violated the Illinois Credit Card Act, 815 Ill. Comp. Stat. 140/6 (West 1994), and constituted common law fraud and common law breach of contract. The Illinois Appellate Court affirmed the Illinois trial court's dismissal of all three counts for failure to state a claim under Illinois law. Petitioners do not seek review of the Illinois Appellate Court's determination that FCC's shadow grace period policy complies with the Illinois Credit Card Act. *See* Petition at 10 n.5. Petitioners, however, do challenge the Illinois Appellate Court's holding that FCC's shadow grace period policy did not breach the Agreement and did not constitute fraud.

REASONS FOR DENYING THE WRIT

This Court should deny the Petition because: (1) this Court does not have jurisdiction to hear it; and (2) the decision of the Illinois Appellate Court, from which Petitioners seek to appeal, was correct and does not conflict with the decision of any other tribunal.

I. This Court Lacks Jurisdiction.

This Court should deny the Petition because it does not have jurisdiction over it. This case involves the dismissal of Petitioners' state law claims by a state appellate court applying state law principles. 28 U.S.C. § 1257(a)

(1994), Petitioners' purported jurisdictional basis, *see* Petition at 2, requires that some federal interest be at issue to confer jurisdiction:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Petitioners try to create that federal interest in one of two ways: (1) by mischaracterizing the Illinois Appellate Court decision as holding that FCC's compliance with the disclosure requirements of TILA preempted Petitioners' state common law claims in violation of the Constitution's Supremacy Clause and this Court's precedents on preemption, *see* Petition at 11-14; and (2) by contending that the Illinois Appellate Court's reliance on the federal appellate court's holding in *Price* that FCC's disclosures complied with TILA confers jurisdiction in this Court not only to review the Illinois Appellate Court decision but also to review the Seventh Circuit's decision in *Price*, *see* Petition at 15-20, which this Court has already once declined to review.

None of Petitioners' arguments creates jurisdiction under 28 U.S.C. § 1257(a).

A. There Is No Violation Of The Supremacy Clause Or This Court's Precedents On Preemption.

To create a federal interest, Petitioners first mischaracterize the Appellate Court as holding that FCC's compliance with TILA's disclosure requirements "superseded state common law actions for breach of contract and fraud." Petition at 11. Petitioners then claim that this holding: (1) violates the Supremacy Clause, U.S. Const. art. VI, cl. 2, because it sanctions an unwarranted and unprecedented federal incursion into the historical powers of the States to protect their citizens' rights; and (2) misapplies this Court's precedents on preemption. *See id.* at 11-14.

In fact, the Illinois Appellate Court never held that TILA superseded any of Petitioners' state law claims and never applied the preemption doctrine. Indeed, it neither discusses, nor even mentions, either issue. Instead, the Illinois Appellate Court simply held that since FCC's disclosures complied with TILA they satisfied Illinois law because, as a matter of public policy, Illinois does not impose greater disclosure requirements upon credit card issuers than those contained in TILA. *See Price v. FCC National Bank*, 673 N.E.2d 1068, 1070-1071 (Ill. App. 1996), *appeal denied*, 679 N.E.2d 385 (Ill. 1997) ("Accordingly because defendants' disclosure of the grace period complied with the federal Truth In Lending Act, and compliance with that act is compliance with Illinois law, plaintiffs' complaint was properly dismissed for failure to state a claim.") In reaching this conclusion, the Illinois Appellate Court was merely following the lead of the Illinois Supreme Court, which had earlier come to the

same conclusion in a similar context. *See Lanier v. Associates Finance, Inc.*, 499 N.E.2d 440, 444-447 (1986) (dismissing state statutory and common law claims against a credit issuer who had complied with TILA based on a state policy against extending Illinois' disclosure requirements beyond those mandated by TILA).

Illinois' decision to deem compliance with TILA as satisfying its own credit disclosure requirements is voluntary. Consequently, the Illinois Appellate Court decision dismissing Petitioners' state law claims does not implicate the Supremacy Clause, historical notions of States' rights, the preemption doctrine, or any other federal law or doctrine. Since 28 U.S.C. § 1257(a) requires that some federal interest be involved to confer jurisdiction to hear the Petition, and since none is involved here, this Court should deny the Petition.

B. That The Illinois Appellate Court Relied On A Federal Appellate Court Decision In Reaching Its Decision Does Not Confer Jurisdiction.

Petitioners also ask this Court to grant their Petition as a way to review the Seventh Circuit's decision in *Price*, which Petitioners contend was erroneously decided. *See* Petition at 15. As will be demonstrated, *see supra* at 8-12, the Seventh Circuit's decision was correct. However, as a jurisdictional matter, that is irrelevant because, right or wrong, Petitioners cannot use the Illinois Appellate Court's reliance on the Seventh Circuit's decision to establish jurisdiction to hear the Petition.

As Petitioners concede, when this Court denied their petition for a writ of certiorari to review the Seventh

Circuit's decision, that decision became final and permitted the Illinois Appellate Court to rely on it. *See* Petition at 15. However, nothing in the Seventh Circuit's decision compelled the Illinois Appellate Court to hold that compliance with TILA satisfied Illinois' disclosure requirements. To the contrary, once the Seventh Circuit dismissed Petitioners' TILA claim, it dismissed their state law claims for lack of jurisdiction. *See Price*, 4 F.3d at 475. Thus, the Illinois Appellate Court was always free to determine whether Petitioners' common law claims stated causes of action under state law.

Nor does the fact that, in reaching its decision, the Illinois Appellate Court accepted the Seventh Circuit's determination that FCC's disclosures complied with TILA create jurisdiction in this Court to review either the Illinois Appellate Court decision or the Seventh Circuit decision. The Illinois Supreme Court has held that Illinois' consumer credit disclosures are the same as those under TILA, *see Lanier*, 499 N.E.2d at 444-447, and so in following the Seventh Circuit decision, the Illinois Appellate Court was merely complying with Illinois law. It is well settled law that when a state court is merely following state law by giving preclusive effect to a federal court decision, the state court does not create a federal interest so as to confer jurisdiction under 28 U.S.C. § 1257(a). *See Fox Film Corp. v. Muller*, 296 U.S. 207 (1935) (holding that this Court lacked jurisdiction to entertain appeal from a state court finding that an earlier federal action had determined that a provision in a contract violated federal antitrust laws because the state court decision was based on state law concepts of estoppel and the application of

estoppel ruling was independent of the validity of the prior federal decree).

Petitioners' attempt to use this case as a method to seek review of the Seventh Circuit decision is unwarranted jurisdictionally and would create poor precedent besides. Petitioners had their bite at the apple when they sought review of the Seventh Circuit decision directly. They are not entitled to another one. This Court should deny the Petition.

II. The Illinois Appellate Court Decision Was Correctly Decided.

Because the Illinois Appellate Court decision does not implicate, much less violate, the Supremacy Clause or this Court's precedents on preemption, *see infra* at 5-6, there is no need to grant the Petition to review Petitioners' argument that it does. Moreover, this Court should not consider Petitioner's other reason for review, that the Seventh Circuit decision was wrongly decided, because this Court has previously refused to consider this question, *see Price*, 510 U.S. 1046 (1994), and nothing has occurred since then that should change that result, such as a decision contrary to the Seventh Circuit decision by another tribunal. *See* Sup. Ct. R. 10 (Considerations Governing Review On Certiorari). But even if this Court were inclined to reconsider this question, it should still not grant the Petition because: (1) the Seventh Circuit decision is correct; and (2) denying the Petition will have little effect and will not harm consumers.

A. The Truth In Lending Act And Regulation Z Permit FCC's Shadow Grace Period Policy.

At issue in the Seventh Circuit decision was the proper interpretation of Section 127(b)(9) of TILA and Section 226.7(j) of Regulation Z, 12 C.F.R. 226.7(j) (1995), promulgated by TILA's regulators, the Federal Reserve Board (the "Board"). FCC interpreted TILA and Regulation Z as permitting an undisclosed five-day grace period as a matter of business practice. Petitioners interpreted it as mandating disclosure of this five-day grace period. FCC's interpretation was, and is, correct.

In relevant part, Section 127(b)(9) of TILA requires a creditor to reveal in its periodic billing statements:

> The day by which or the period (if any) within which payment must be made to avoid additional finance charges, except that the creditor may, at his election and without disclosure, impose no such additional finance charge if payment is received after such date or the termination of such period.

Section 127(b)(9) is clear. It sets forth a general rule in the first clause and an exception to the general rule in the second clause. The general rule requires a credit card issuer to reveal in its periodic billing statements the contractual date on which its cardholders' payments are due. The exception allows the credit card issuer, without disclosure, to forebear from imposing contractually permissible finance charges if its cardholders' payments are received after their contractual due dates.

FCC's challenged practice complies with Section 127(b)(9). FCC informs cardholders who have previously

timely paid their bills in full, the Full Paying Cardholders, that they have 20 days within which to pay their bills. Thereafter, FCC unilaterally, and without disclosure, forbears from actually imposing contractually permissible interest charges unless their payments are received more than five days after their due dates. For the same reasons, it also complies with Regulation Z which provides in pertinent part: "a creditor may, at its option and without disclosure, impose no finance charge when payment is received after the time period's expiration." 12 C.F.R. § 226.7(j).

To reach their contrary construction, Petitioners initially posit that the general rule in the first clause of Section 127(b)(9) does not require a credit card issuer to reveal in its periodic billing statements the date on which its cardholders' payments are contractually due. Rather, Petitioners argue, it requires the issuer to reveal the date on which it will actually impose finance charges, taking into account all undisclosed and internal forbearance policies maintained by the issuer. *See* Petition at 17. Having construed the first clause so illogically, Petitioners then flounder in their attempt to construe the exception in the second clause of Section 127(b)(9) in a way that makes any sense at all. The construction offered by them is that the second clause only "allows a creditor to waive finance charges actually incurred on a late payment." *Id.* at 18. Petitioners' construction cannot be correct because under it the exception to the general rule ceases to exist and it is at odds with the plain language of Section 127(b)(9).

As Petitioners concede, under their construction a credit card issuer may only decide to forbear from imposing contractually permissible interest after its cardholders' Payment Due Dates have passed. *See id.* at 18. Yet Section 127(b)(9) states that the "creditor may, at his election and without disclosure, impose no additional finance charge[.]" Impose is the present active form of the verb. Any decision *not to impose* finance charges must necessarily be made prior to the imposition of those finance charges. Petitioners' construction, which requires the reversal of a finance charge previously *imposed*, cannot be correct.

Moreover, under Petitioners' construction, there is never a circumstance under which the card issuer can decide not to impose a finance charge without disclosing its decision. Section 127(b)(9) allows a credit card issuer not to impose finance charges *without disclosure*. If a credit card issuer may only "waive" previously imposed finance charges in response to cardholder complaints, it is impossible to do so without disclosure. Obviously, the "waiver" must be disclosed to the cardholder. If the card issuer has to tell the cardholder finance charges will be assessed after a certain date, then the card issuer cannot make an undisclosed decision not to impose a finance charge after that date.

Section 127(b)(9) contains a general rule and an exception. By containing an exception, Section 127(b)(9) recognizes there will be a situation where disclosure will

not be made. FCC's practice is authorized by TILA. This Court should deny the Petition.[3]

B. Denying The Writ Will Have Little Effect And Will Not Harm Consumers.

Petitioners also argue that the Petition should be granted because the Seventh Circuit's decision in *Price* and the "erroneous decision below . . . will have a profound nationwide effect on tens of millions of cardholders[.]" Petition at 20. Central to Petitioners' thesis is that the decision below represents a new interpretation of TILA. What Petitioners ignore is that the practice complained of is the industry standard and has been, with the approval of the Board, since at least 1971.

In 1971, Section 127(b)(9) did not contain the exception in the second clause. Instead, it simply contained the general rule in the first clause which required the creditor

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[3] Petitioners also argue that subsequent Seventh Circuit decisions conflict with the Seventh Circuit's decision in *Price*. Petition at 18-19 (citing *Highsmith v. Chrysler Credit Corp.*, 18 F.3d 434, 439 n.3 (7th Cir. 1994), and *Channell v. Citicorp Nat. Services, Inc.*, 89 F.3d 379, 383 (7th Cir. 1996)). This argument is makeweight. Neither of those cases involved credit card issuers, and so the disclosure scheme contained in 15 U.S.C. § 1637(b)(9) was not applicable in either case. Indeed, the Seventh Circuit specifically commented on this when it distinguished its holding in *Price* from that in *Highsmith*. *Highsmith*, 18 F.3d at 439 n.3. To distinguish a case means to differentiate it, not overrule it. *See Atencio v. Espanola Housing Authority*, 568 P.2d 1245, 1250 (N.M. Ct. App. 1977) ("Distinguish means to point out an essential difference; to prove a case, cited as applicable, as inapplicable.") The Seventh Circuit's decision in *Price* is as good law now as the day it was decided.

to reveal: "the date by which, or the period (if any) within which, payment must be made to avoid additional finance charges." In response to a letter asking for clarification regarding whether Section 127(b)(9) permitted the then widespread industry practice whereby credit card issuers granted their cardholders an undisclosed period within which to pay credit card bills, the Board, in permitting the practice, responded:

> In your letter of April 19, 1971, you inquired whether it would be permissible in an open end credit plan, to disclose under § 226.7(b)(9) of Regulation Z the fact that payment in full must be made within 25 days in order to avoid finance charges, when, in reality, the creditor allows a full month from the close of the billing cycle before imposing finance charges.
>
> We believe that it is permissible under Regulation Z to allow an additional grace period beyond the date specified in which to receive payments before a finance charge is assessed. Consequently, the plan you propose would be permissible.

Excerpt from Board Interpretive Letter No. 475, dated May 10, 1971, by Griffith L. Garwood, Attorney, CCH Consumer Credit Guide, ¶ 30,675.

TILA was amended in 1974. At that time, the exception to the general rule in the second clause was added to Section 127(b)(9). As is required, the Board summarized the amendment in the Federal Register. This summary, which sets forth an example of how Section 127(b)(9) works, says:

> For example, a creditor may disclose that the customer has 25 days in which to pay his account in full to avoid additional finance charges but as a matter of business practice allows [sic] the customer a full 30 days – the beginning of the next billing cycle – to pay the account without the imposition of additional finance charges.

40 Fed. Reg. 1717 (1975). Except for the number of days used, this example is exactly the same as FCC's practice.

For over twenty-six years the practice such as the one engaged in by FCC has been publicly approved by the agency responsible for administering TILA. The decision below, which only affirms that policy, is hardly likely to cause much of a stir.[4]

Should the decision below and the Seventh Circuit decision in *Price* be reversed, cardholders will be disadvantaged. What Petitioners seek to eliminate is FCC's grant of a gratuitous forbearance period. This Court's adoption of Petitioners' interpretation simply means that FCC must eliminate its free forbearance policy and that FCC must charge its cardholders interest if their payments are received as little as a day late, unless a cardholder specifically calls up and complains. As the District Court observed in dismissing Petitioners' claim: "[i]t is hard to fathom what Congress' reasoning would have been for such a policy[.]" *Price v. FCC National Bank*, No.

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[4] The Board's interpretation of Section 127(b)(9) is entitled to great deference. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Moreover, contemporaneous administrative construction of a statute is persuasive evidence of its meaning. *United States v. Sheffield Board of Commissioners*, 435 U.S. 110, 131 (1978).

92 C 2164, 1992 U.S. Dist. LEXIS 12462 at *5 (N.D. Ill. Aug. 18, 1992). The Petition should be denied.

CONCLUSION

This case simply involves a state court's dismissal of Petitioners' state law causes of action employing state law principles. Consequently, this Court does not have jurisdiction over the Petition. Moreover, even if it did, this Court should not grant the Petition because the decision of the Illinois Appellate Court was correct. All in all, four courts have reviewed Petitioners' claims without a single judge or justice opining that they had any merit whatsoever. Further, this Court has already once declined to review Petitioners' claims, as has the Illinois Supreme Court. The time has come to put an end to Petitioners' misuse of the state and federal court systems. This Court should deny the Petition.

Respectfully submitted,

LYNN A. GOLDSTEIN
JOHN C. SIMONS
(Counsel of Record)
The First National
Bank of Chicago
One First National Plaza,
Suite 0286
Chicago, Illinois 60670-0286
(312) 732-6919, 732-5099

Attorneys for Respondent
FCC National Bank